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The State of Arbitral Fees After *Green Tree Financial*: Uncertainty And Contradiction Demands Further Guidance From The Supreme Court

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There are millions of employees in America who work every day without regard to the technical and seemingly mundane matters that govern their employment. What they don't realize however, is that their employment may be governed by an arbitration agreement. After the Supreme Court's recent decision in *Circuit City Stores v. Adams*[2], arbitration agreements are permissible in most employer/employee relationships and fall under the purview of the Federal Arbitration Act (FAA). The terms of the arbitration agreement, though, may be unclear until a dispute arises.[3] During the resolution of any dispute, the terms of the arbitration agreement may be unclear even to the attorneys on each side of the dispute. This is particularly applicable in the area of arbitral fees, where the Supreme Court's decision in *Adams* has provided little guidance to lower courts enforcing arbitration agreements and the attorneys construing them. This has led to a split among United States Courts of Appeals when addressing the issue of who should pay the fees arising from the arbitration of employment disputes. This fissure in American jurisprudence is the subject of this study.

The form of this study will flow through several different parts. After some preliminary information concerning the FAA, the first section will focus on decisions in the pre-*Green Tree Financial* era. These decisions, including the seminal *Gilmer v. Interstate/Lane Johnson Corporation*, reflect the Supreme Court's and other courts' pro-arbitration agreement

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2. Circuit City Stores v. Adams, 532 U.S. 105 (2001). The Supreme Court ruled that § 2 of the Federal Arbitration Act was not widely restrictive, but widely permitted arbitration agreements in most employment relationships. *Id.*

3. *Id.*

stance. Also in this era, several United States Courts of Appeals addressed the imposition of arbitral fees, and their decisions were as diverse as the different areas of the country covered by their respective jurisdictions. These decisions set the stage for the Supreme Court to address the issue in *Green Tree Fin. Corp. v. Randolph.* Accordingly, the second section will break down the Supreme Court's recent decision in *Green Tree Fin. Corp. v. Randolph.* [4]Although both principle points from *Green Tree* will be discussed, the focus of this paper is part two of the *Green Tree* decision. In part two, the Supreme Court attempted to address the issue of arbitration fees, and their rule will be discussed extensively. Next, section three will present the United States Court of Appeal decisions in the post-*Green Tree* era in order to see the rule applied. Several courts attempted to apply the arbitration fee language from *Green Tree*, and an examination of these attempts is helpful in determining the reach of the decision. Finally, the last section of this paper will address the issues that have arisen in the post-*Green Tree* era, demonstrating that the uncertainty of arbitral fees has left employers, employees, and their prospective counsel in legal limbo and frequently incapable of utilizing arbitration to effectively settle employment disputes.

Preliminarily, some background on the FAA is necessary. The FAA was designed to end judicial hostility towards arbitration agreements.[5] The FAA manifests a "liberal federal policy favoring arbitration agreements."[6] "[T]he basic purpose of the [FAA was] to overcome courts' refusal to enforce agreements to arbitrate."[7] The Federal Arbitration Act ensures that agreements to arbitrate are "valid, irrevocable, and enforceable."[8] Agreements to arbitrate employment disputes are valid and enforceable unless Congress has specifically precluded arbitration as a dispute resolution device.[9] So long as the employee is able to effectively vindicate his/her statutory rights in arbitration, the forum is an appropriate dispute resolution device.[10] Under this system, agreements to arbitrate employment law claims are regularly enforced.

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4. Greentree Fin. Corp. v. Randolph, 531 U.S. 79 (2000).

5. Gilmer v. Interstate Johnson/Lane Corp., 500 U.S. 20, 24 (1991).

6. *Id.* (quoting Moses H. Cone Mem'l Hosp. vs. Mercury Const. Corp. 460 U.S. 1, 24 (1983)).

7. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995).

8. Federal Arbitration Act, 9 U.S.C. § 2 (2002).

9. *Gilmer,* 500 U.S. at 26-29.

10. *Id.*

I. THE PRE-*GREEN TREE FINANCIAL* Era

In 1991, Robert Gilmer, a registered securities representative employed by Interstate/Johnson Lane Corporation, brought suit against his employer alleging violations of the Age Discrimination In Employment Act.[11] A registration application with the New York Stock Exchange, signed by Mr. Gilmer, required Gilmer to arbitrate any disputes with his employer.[12] Gilmer believed he was fired because of his age (sixty-two years old), and after he brought suit to address the alleged discrimination, Interstate/Lane Johnson Corporation brought a motion to compel arbitration.[13] The District Court refused to compel arbitration, but the United States Court of Appeals for the Fourth Circuit reversed and ordered Mr. Gilmer to arbitrate the dispute because "nothing in the text, legislative history, or underlying purposes of the Age Discrimination in Employment Act (ADEA) "indicates Congress' intent to preclude the arbitration of age discrimination disputes."[14] Mr. Gilmer appealed the decision of the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court granted certiorari to answer the question of "whether a claim under the [ADEA] . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."[15] The Supreme Court emphatically answered the question in favor of arbitration.

Justice Byron White,[16] writing for the Court in a 7-2 decision, began the opinion by explaining the history of the FAA and the strong federal policy in favor of arbitration agreements.[17] Noting the plethora of Supreme Court decisions upholding the validity of arbitration agreements,

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11. *Id.* @ 23.
12. *Id.*
13. *Id.* at 24.
14. *Id.* (Citing the 4th Circuit Decision, 895 F.2d 195, 197 (4th Cir. 1990)).
15. *Gilmer,* 500 U.S. at 23.
16. Justice White passed away during the final stages of this article. At his passing, one is reminded of his brilliance reflected in *Gilmer.*
17. *Gilmer,* 500 U.S. at 24-27. It is interesting to note that Section 1 of the FAA was discussed by Justice White and by Justice Stevens in dissent. Section 1 excludes certain employees from the FAA, and Justice Stevens argued that by virtue of their exclusion that the FAA did not apply to Mr. Gilmer. Justice Stevens refused to rule on the scope of Section 1 because Mr. Gilmer had not raised the issue below. Approximately ten years later, the Court dealt with the scope of Section 1 in *Circuit City v. Adams,* 532 U.S. 105 (2001).

Justice White restated that the FAA "manifest[s] a liberal federal policy favoring arbitration agreements."[18] Further, statutory claims arising under the Sherman Act, Securities and Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act, and the Securities Act of 1933, were sent to arbitration under the FAA.[19] Finally, Justice White noted that parties should be held to their agreements to arbitrate disputes, including disputes arising under a federal statute, unless Congress has specifically excluded arbitration as a remedy under the federal statute.[20]

After dismissing Mr. Gilmer's arguments and noting that Congress has not specifically excluded the arbitration of ADEA disputes, the court went on to dismiss Mr. Gilmer's generalized attack on arbitration procedures and processes, opining that "[s]uch generalized attacks on arbitration res[t] on suspicion of arbitration as a method of weakening the protections afforded in substantive law to would be complainants, and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[21] The end result of the court's opinion is the oft-cited *Gilmer* rule: "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" and Congress has not specifically intended to preclude the arbitral forum to resolve disputes under the statute, then agreements to arbitrate disputes are enforceable.[22] Thus, challenges to arbitration agreements turn on Congress' intent and the effective vindication of statutory rights in the arbitral forum. The party attacking the arbitration agreement bears the burden in both of these areas.[23]

In 1997, the United States Court of Appeals for the District of Columbia entertained a challenge to an arbitration agreement by an employee bringing a discrimination claim.[24] The case involved Clinton Cole, a security guard at Union Station in Washington D.C. Mr. Cole was required to sign a pre-dispute resolution agreement when Burns International Security Services took over the security contract Mr. Cole was

18. *Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Const. Co., 460 U.S. 1, 24 (1983)).

19. *Gilmer*, 500 U.S. at 26 (citations omitted).

20. *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

21. *Gilmer*, 500 U.S. at 30 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

22. *Gilmer*, 500 U.S. at 26-28.

23. *See id.* at 26 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987)).

24. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (1997).

working under.[25] After Cole brought suit for discrimination, harassment and retaliation, the employer moved to compel arbitration as called for in the pre-employment dispute agreement.[26] The District Court compelled, and Cole appealed.

Chief Judge Harry Edwards wrote the lengthy and well-reasoned opinion for the near-unanimous court.[27] In its opinion, the court discussed arbitration in depth and examined the alleged pitfalls and controversies raised by agreements to arbitrate.[28] The issue addressed by the *Cole* court particularly germane to the study at hand was the imposition of arbitral fees.[29] The court noted that arbitration fees range from $500 to $1000 a day or more, and are in addition to the administrative and attorneys' fee accumulating from the dispute.[30] The court went on to say that "there can be no doubt that parties appearing in federal court may be required to assume the costs of filing fees and other administrative expenses, so any reasonable costs of this sort that accompany arbitration are not problematic."[31] However, if the fees are exorbitant, the employee may be deterred from vindicating their rights in the arbitral forum.[32] In a case such as *Cole*, where the employer had conditioned employment upon the employee signing the dispute resolution agreement, the court construed this as a benefit to the employer, and thus ruled that all of the costs and fees associated with arbitration should be borne solely by the employer.[33]

After concluding as a bright line rule that employers should bear all of the arbitral fees, the court entertained arguments that this one-sided billing practice would harm employees.[34] Specifically, the court noted argument that if the employer always paid the bill, the arbitrator would al-

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25. *Id.* at 1469.

26. *Id.* at 1470.

27. Judge Karen LeCraft Henderson concurred in part and dissented in part.

28. *Cole*, 105 F.3d at 1483.

29. *Id.* at 1483-87.

30. *Id.* at 1484.

31. *Id.* The Court noted in a footnote that arbitral fees may be waived under the rules of the provider organization, such as the American Arbitration Association. *Id.* n.12.

32. *Id.* The Court cited David W. Ewing, *Justice on the Job: Resolving Grievances in the Nonunion Workplace,* Harvard Business School Press 1989, at 291. The Article noted that Northrop pays all of the costs associated with the arbitration of employee-employer disputes because if they didn't, their employees would not be able to afford it. *Id.*

33. *Cole*, 105 F.3d at 1485.

34. *Id.*

ways favor the employer.[35] The court dismissed this argument; "if an arbitrator is likely to lean in favor of any employer — something we have no reason to suspect — it would be because the employer is a source of future arbitration business and not because the employer alone pays the arbitrator."[36] Even if certain arbitrators did favor employers, such a practice would not go unnoticed by the provider organizations' and plaintiffs' counsel, and the appearance of corruption would eventually lead to the judiciary overturning arbitral awards.[37]

Finally, the *Cole* court read the arbitration agreement at issue as ambiguous on the fee issue.[38] Relying on the Restatement Second of Contracts and other contract interpretation law, the court construed the agreement to mean that the employer would pay all of the costs associated with arbitration.[39] Thus, the court inserted a term consistent with the opinion they had already reached. The court held that an employee may not be required to pay all or part of the costs and fees of arbitration under an agreement the employee was required to sign as a condition of employment.[40]

In 1998, the United States Court of Appeals for the Eleventh Circuit had occasion to visit the fee issue in a case challenging the denial of a motion to compel arbitration.[41] The case involved Ellen Sue Paladino and her employer, Avnet Computer Technologies Inc. (hereinafter "Avnet"). Paladino signed a pre-employment dispute resolution agreement that mandated arbitration of all claims related to employment.[42] The clause heavily favored the employer, for it limited employee's potential damage award to contractual damages only.[43] After Paladino was fired, she brought suit under Title VII and state law claims. Avnet then brought a motion to

35. *Id.* Commentators have called the one-sided billing a "perversion of the arbitration process." *See* Task Force on ADR In Employment, Due Process Protocol, § c (6) (May 9, 1995).

36. *Cole,* 105 F.3d. at 1485 (citing Mark Berger, *Can Employment Law Arbitration Work?* 61 U. Mo. — Kan L. Rev. 693, 714 (1993)). The *Cole* Court notes there is ample evidence to support the argument that arbitrators favor employers because they know that in doing so they will increase their chances of getting future business.

37. *Cole,* 105 F.3d. at 1485.

38. *Id.* The agreement made no mention of fees, but rather relied on the American Arbitration Association rules, which do contain fee provisions.

39. *Id.* at 1485-86.

40. *Id.*

41. Paladino v. Avnet Computer Tech. Inc., 134 F.3d 1054 (11th Cir. 1998).

42. *Id.* at 1056.

43. *Id.* Since arbitration is a creature of contract, this agreement limiting damages effectively limited the arbitrator's authority.

compel arbitration under the FAA.[44] The district court denied the motion, and Avnet appealed to the appellate court for redress. The single issue on appeal was whether the district court erred in refusing to grant the motion to compel.[45]

The court created two opinions to address the issues in this case. First, Chief Justice Hatchett's majority opinion construed the contradictory language in the employer-created arbitration clause as inconsistent with the vindication of federal statutory rights. This was because the arbitrator's award was limited to contractual damages only while the clause mandated all disputes to arbitration.[46] Thus, the employee had to go to arbitration, but the arbitrator could only award limited damages. This provision was deemed unlawful, and together with the other "woefully deficient" language, created an arbitral forum in which an employee could not effectively vindicate their statutory rights. [47] The fee issue was addressed in Judge Cox's concurring opinion. Noting that arbitration must "permit relief equivalent to court remedies," Judge Cox pointed out that under the Avnet clause, the employee is liable for at least half of the arbitration costs and must pay the $2000 filing fee.[48] Citing the *Cole* court's decision that fee shifting is prohibited per se, Judge Cox wrote, "we consider cost of this magnitude a legitimate basis for a conclusion that the clause does not comport with statutory policy."[49] Although the entire agreement had already been thrown out at this point (and thus the above quoted language amounted to dicta) it nonetheless evidenced the Eleventh Circuit's willingness to invalidate arbitration agreements based upon fee clauses that are perceived unfavorable to the effective vindication of employee's statutory rights.

In 1999, the Tenth Circuit entertained the fee question in an appeal

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44. *Id.*

45. *Id.* The denial of a motion to compel arbitration is reviewed *de novo*. Kidd vs. Equitable Life Assur. Soc' of Am., 32 F.3d 516, 518 (11th Cir. 1994). *See also* Armijo vs. Prudential Ins. Co., 72 F.3d 793, 796 (10th Cir. 1995); Lorber Indus. vs. Los Angeles Printworks Corp., 803 F.2d 523, 524 (9th Cir. 1986).

46. *Paladino,* 134 F.3d at 1057-58.

47. *Id.* at 1059.

48. *Id.* at 1062. The filing fee was under the American Arbitration Association Commercial Arbitration Rules.

49. *Id.*

from the denial of an employer's motion to compel arbitration.[50] The case involved Matthew Shankle and his former employer, B-G Maintenance Management, Incorporated of Colorado (hereinafter "B-G").[51] As a precondition to his employment as a janitor, B-G required Shankle to sign an arbitration agreement that mandated all claims, including claims brought under federal anti-discrimination statutes, to arbitration.[52] The costs of arbitration were assigned equally to the employer and the employee, and if the employee was unable to pay, the employer would pay on the employee's behalf and the employee would have to pay the employer back.[53] After Shankle was terminated, he filed a discrimination charge with the Equal Employment Opportunity Commission.[54] While the charge was pending, the case was referred to an arbitrator pursuant to the arbitration agreement.[55] The arbitrator accepted the case, then sent a letter to B-G and Shankle informing them of the anticipated costs of arbitration, and instructing each of them to forward the arbitrator a $6000 deposit.[56] Shankle objected to the arbitration proceedings, and filed suit in federal court.[57] B-G filed a motion to compel, but the district court refused to grant the motion because the fee splitting provision rendered the arbitral forum an unreasonable substitute for the judicial forum, one in which Mr. Shankle could not effectively vindicate his statutory rights.[58] B-G appealed.

The unanimous opinion of the court immediately and exclusively addressed the problems raised by the fee splitting clause.[59] The court opined, "[a]s *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statu-

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50. Shankle vs. B-G Maint. Mgmt. of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999).

51. *Id.* at 1231.

52. *Id.* at 1232.

53. *Id.*

54. *Id.* It is interesting to note that Mr. Shankle's case would probably proceed differently under the Supreme Court's recent decision in *EEOC v. Waffle House,* 534 U.S. 279 (2002) in which the Court preserved the EEOC's powers to proceed with a case despite a valid agreement to arbitrate between the employer of and employee. In Shankle's case, the arbitration went forward despite the EEOC's investigation. This would probably not be the result today.

55. *Shankle,* 163 F.3d. at 1232.

56. *Id.* The arbitration provider was Judicial Arbiter Group, Inc. *Id.* The arbitrator was $250 an hour for hearing time, $125 an hour for travel time, and had a $45 dollar an hour support staff fee. *Id.*

57. *Shankle,* 163 F.3d. at 1232. Shankle had initially objected when he was presented the arbitration agreement, but eventually consented. *Id.* The Court's opinion seems to suggest that Mr. Shankle's EEOC charge was dropped after the matter went to arbitration, then he filed another charge, then sued in federal court on the first charge. *Id.*

58. *Shankle,* 163 F.3d. at 1232-33.

59. *Id.* at 1233.

tory claims and because the broader social purposes behind the statute are adhered to."[60] The arbitration system envisioned by the Supreme Court, though, falls apart when the employee cannot effectively vindicate their rights in the arbitral forum.[61] Noting *Cole* and *Paladino*, the court said that if an arbitration agreement rules out the judicial forum, it must provide an effective and accessible forum.[62] In case before it, Shankle was contractually obligated to pay between $1,875 and $5,000 to have his claim settled in arbitration.[63] Shankle could not afford this fee, nor could similarly situated employees, thus "Mr. Shankle [was] between the proverbial rock and a hard place," prohibited from accessing the judicial forum by his arbitration agreement, and frustrated from using the arbitral forum because of its high costs.[64] Accordingly, the court ruled the agreement to arbitrate was unenforceable because Shankle could not adequately vindicate his statutory rights.[65]

In holding that arbitration agreements which require employees to pay part of the arbitrator's fees in order to hear their statutory claims are unenforceable, the court dismissed several of the employer's arguments. First, the employer argued that the agreement allowed the employer to pay all of the fees upfront, and the arbitrator could deduct any portion of the fees due from the employee from any potential award.[66] The court dismissed this argument because the mere possibility of fee shifting does not lessen the financial burden to the employee; the employee may still be deterred from accessing the forum because of the prospectively high fees.[67] Secondly, the employer argued that the court should sever or "redline" the fee-shifting portion of the arbitration agreement, thus giving effect to the parties' intent to arbitrate.[68] The court rejected this argument too because the agreement at issue was unambiguously clear on fees, and a "court is without authority to alter or amend contract terms and provi-

60. *Id.* at 1234 (citing *Gilmer*, 500 U.S. at 24).
61. *Shankle*, 163 F.3d. at 1234.
62. *Id.*
63. *Id.*
64. *Id.* at 1234-35.
65. *Id.* (citing *Gilmer*, 500 U.S. at 28; *Cole*,105 F.3d. at 1484-85.)
66. *Shankle*, 163 F.3d. at 1234 n. 4.
67. *Id.*
68. *Id.* at 1235 n. 6.

sions absent an ambiguity."[69] Finally, the employer argued fee splitting encourages arbitrators to act in an impartial way.[70] The court rejected this argument also, and relying on *Cole*, stated that even if fee splitting was found to promote neutrality among arbitrators, "[the] benefit is substantially outweighed by the impediment such a provision places on access to the arbitral forum."[71] Therefore, pre-employment arbitration agreements, which require employees to pay part of the arbitration costs, are unenforceable in the Tenth Circuit.

As the cases above indicate, several courts have had significant issues with enforcing agreements to arbitrate that apportion even a portion of the arbitral fees to employees vindicating their statutory rights. However, there are arguments to the contrary.

In 1999, the United States Court of Appeal for the Fifth Circuit heard a case in which fees were a significant issue.[72] The case involved a dispute between Arthur Williams and his former employer, Cigna Financial Advisors Inc. (hereinafter "Cigna").[73] Williams' employment was covered by an arbitration clause, and following his termination, the clause was exercised to hear Williams' age discrimination claim.[74] Following arbitration of the matter, the arbitrator ruled in favor of Cigna and assessed Williams $3,150 in arbitration fees.[75] The United States District Court for Northern District of Texas enforced the award, and Williams appealed. Williams argued that the award manifestly disregarded the law and the imposition of arbitral fees violated public policy.[76]

The court's opinion is in two parts, the second being of most relevance to the point of this paper. The first portion of the court's opinion dismissed Williams manifest disregard of the law argument, noting that the evidence solidly supported the arbitrator's decision.[77] In the second part of the opinion, the court addressed the fee issue. Williams, relying on *Gilmer, Cole* and *Shankle*, argued that the $3,150 in arbitral fees assessed to him violated public policy.[78] However, the court disagreed and wrote

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69. *Id.* (citing Awbrey vs. Pennzoil Co., 961 F.2d 928, 930 (10th Cir. 1992).)
70. *Shankle*, 163 F.3d. at 1235.
71. *Id.*
72. Williams vs. Cigna Fin. Advisors Inc., 197 F.3d 752 (5th Cir. 1999).
73. *Id.* at 755.
74. *Id.*
75. *Id.* at 755-64.
76. *Id.*
77. *Williams*, 197 F.3d at 762. The Court was so impressed with the evidence; they didn't even go into part two of the manifest disregard of the law analysis. *Id.*
78. *Id.* at 763. The *Cole* Court relied heavily on *Gilmer* in reaching their decision. *Id.*

"in our opinion . . . *Gilmer* does not so clearly imply that no part of arbitral forum fees may ever be assessed against federal anti-discrimination claimants, although it plainly indicates that an arbitral cost allocation scheme may not be used to prevent the effective vindication of federal statutory claims."[79] Noting that the arbitration procedures Williams was contracted to had recently changed, the court nonetheless did not dispute the fees assessed Williams because he had not demonstrated that he was unable to pay the fees or that the fees "prevented him from having a full opportunity to vindicate his claims effectively or prevented the arbitration proceedings from affording him an adequate substitute for a judicial forum."[80] Further, the court noted Williams' situation was factually distinguishable from those described in *Shankle* and *Cole*, in that Williams was making a six-figure income at his new job while pursuing the case against his former employer.[81] Therefore, since there was "no evidence that the prospect of incurring forum fees hampered or discouraged Williams in the prosecution of his claim," the fee issued was dispersed with in a manner unfavorable to Williams.[82]

The United States Court of Appeal for the First Circuit dealt with similar issues in a case challenging the enforceability of an arbitration agreement.[83] The case involved Susan Rosenberg and her former employer, Merrill Lynch.[84] Rosenberg's employment was covered by an arbitration agreement, which was invoked after she was fired and brought suit for age and gender discrimination.[85] The district court denied the motion to compel arbitration. Rosenberg opted out of a class action settlement, and instead chose to challenge the arbitration agreement before the United States Court of Appeal for the First Circuit.[86]

The issues on appeal were many. The court determined that Title VII claims were properly subject to arbitration, although the agreement at is-

79. *Id.* (citing *Gilmer*, 500 U.S. at 28.)

80. *Williams*, 197 F.3d at 764.

81. *Id.* at 764-65.

82. *Id.* at 765. The Court noted that the arbitration provider rule change mooted the issue of whether future fees would violate the rights of future litigants.

83. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 170 F.3d 1 (1st Cir. 1999).

84. *Id.* at 4.

85. *Id.* at 4-7.

86. *Id.* at 7.

sue did not meet the basic requirements to mandate arbitration.[87] Further, the court concluded that the ADEA claims were properly subject to arbitration agreements.[88] Finally, the court dealt with the fee issue when it addressed the legality of the arbitration system under which Ms. Rosenberg's claim was slated to be heard.[89] The court's response to the challenges to the imposition of fees under the system was threefold.[90] First, the court noted that sometimes arbitrators "do undesirable things in individual cases," but this does not invalidate the entire system.[91] Secondly, it did not appear to the court that fees were normally assessed to the employee-litigant.[92] Finally, if "unreasonable fees were imposed on a particular employee," such an assessment would violate *Gilmer* and Title VII.[93] In addressing the unreasonableness of fees, the Court opined "contrary to Rosenberg's arguments, arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court."[94] Thus, although *Gilmer* does not mandate the enforcement of all arbitration agreements, the Court ruled that Rosenberg had not met her evidentiary burden of establishing the invalidity of the arbitral system simply by arguing against the imposition of fees as part of that system.[95]

The United States Court of Appeals for the Seventh Circuit entered the fray when they too decided a case with a fee component.[96] The case involved Mary Koveleskie's sexual discrimination suit against her former employer, SBC Capital Markets Incorporated.[97] After Koveleskie brought suit, SBC brought a motion to compel arbitration in accordance with the arbitration clause that governed the employer-employee relationship.[98] The district court, though, refused to compel arbitration and instead allowed discovery to proceed.[99] SBC appealed.

On appeal, the court first determined it had jurisdiction to hear the case, then proceeded to discuss the preference for arbitration agreements

87. *Id.* at 8-20.
88. *Rosenberg,* 170 F.3d at 12-14.
89. *Id.* at 14.
90. *Id.* at 15.
91. *Id.*
92. *Id.* at 16.
93. *Id.* The Court specifically cites the Civil Rights Act of 1991 (CRA) which amended Title VII. (cite)
94. *Rosenberg,* 170 F.3d at 16 (citing *Gilmer,* 500 U.S. at 31).
95. *See Rosenberg,* 170 F.3d at 16.
96. Koveleskie vs. SBC Capital Mkt., 167 F.3d 361 (7th Cir. 1999).
97. *Id.* at 362-63.
98. *Id.* at 362.
99. *Id.* at 363.

under the FAA and the Supreme Court's precedence.[100] After concluding that the case was properly subject to arbitration, the court discussed the adequacy of the arbitration procedures — including the issue of fees.[101] On the issues of fees, the court quoted extensively from the United States Court of Appeals for the First Circuit's decision in *Rosenberg*, adopting the three part argument rejecting an attack on fees, and even noting that the *Cole* court adopted a system of arbitration similar to the one at bar.[102] Finally, the court noted that when exorbitant fees are present, arbitrators often waive the fees due to hardship.[103] Accordingly, the court of appeals reversed the district court and remanded the case in order to compel arbitration in the matter. Thus, the fee issue did not invalidate the agreement.

As the varying outcomes of the aforementioned court decisions indicate, the question of arbitral fees needed to be addressed. Should courts apply a bright line rule, i.e. the *Cole* case, or should courts apply a more fact-based analysis, i.e. the *Williams* case? When the Supreme Court considered arbitral fees as part of the *Green Tree* case, it was hoped that we would finally have an answer.

II. *GREEN TREE FINANCIAL VS. RANDOLPH*

The case involved Larketta Randolph's challenge of the arbitration agreement contained in the purchase contract for her mobile home.[104] Randolph financed the purchase of her new home through *Green Tree Financial* of Alabama, whom she later sued, alleging violations of the Truth in Lending Act.[105] Randolph attempted to have her action certified as a class action, but the district court denied class certification and instead compelled arbitration through *Green Tree's* motion.[106] Concurrently, the

100. *Id.* at 363-66.

101. *Id.* at 365. The Court specifically disagreed with the United States Court of Appeals for the Ninth Circuit holding that the Civil Rights Act of 1991 evidenced Congress' intent to preclude the arbitration of Title VII claims. *See* Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998). A majority of the Circuits disagree with *Duffield. Koveleskie*, 167 F.3d at 366.

102. *Koveleskie*, 167 F.3d at 366 (citing *Cole*, 105 F.3d 1465 and *Williams*, 197 F.3d 752).

103. *Koveleskie*, 167 F.3d at 366.

104. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 82 (2000).

105. *Id.* at 82-83.

106. *Id.* at 83.

district court dismissed Randolph's complaint with prejudice.[107] Randolph requested reconsideration, arguing that she lacked the resources to arbitrate.[108] The district court denied reconsideration and Randolph appealed to the United States Court of Appeals for the Eleventh Circuit.[109] The court of appeals ruled that it had jurisdiction to hear the appeal because granting the motion to compel arbitration was a final appealable order under the FAA. The court further ruled that the agreement to arbitrate was invalid because it failed to provide minimum statutory guarantees, mainly due to its silence as to who was responsible for the costs of arbitration.[110] According to the court of appeals, the entire agreement to arbitrate was unenforceable, because Randolph's ability to vindicate her statutory rights was substantially hampered by high arbitration costs.[111] *Green Tree* appealed the court's decision, and the Supreme Court granted certiorari to answer the final order and fee questions.

The second section of the opinion deals with the procedural question of whether an order to compel arbitration is appealable as a final order under the FAA.[112] The United States Court of Appeals for the Eleventh Circuit ruled that it was a final appealable order, but a majority of appellate courts had reached contrary conclusions.[113] Nonetheless, the Supreme Court overruled the majority of the appellate courts and joined the Eleventh Circuit holding that an order compelling arbitration is a final appealable order under the FAA.[114]

The third part of the opinion is particularly applicable to this study, for the Supreme Court dealt with the imposition of arbitral fees.[115] Randolph's arbitration agreement was silent as to the assignment and/or ap-

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107. *Id.* The district court believed the arbitral forum was the proper forum to hear the case.

108. *Id.* at 83-84.

109. *Id.* at 84.

110. *Green Tree,* 531 U.S. at 84.

111. *Id.*

112. *Id.* at 84-89.

113. *Id.* at 87, n.3. The courts holding contrary to the Eleventh Circuit were Seacoast Motors of Salisbury, Inc. v. Chrysler Corp., 143 F.3d 626, 628-629 (1st Cir. 1998); Altman Nursing, Inc. v. Clay Capital Corp., 84 F.3d 769, 771 (5th Cir. 1996); Napleton v. Gen. Motors Corp., 138 F.3d 1209, 1212 (7th Cir. 1998); Gammaro v. Thorp Consumer Disc. Co., 15 F.3d 93, 95 (8th Cir. 1994); McCarthy v. Providential Corp., 122 F.3d 1242, 1244 (9th Cir. 1997). The courts holding similarly to the Eleventh Circuit, and ultimately the Supreme Court, were Arnold v. Arnold Corp.—Printed Communications for Bus., 920 F.2d 1269, 1276 (6th Cir. 1990) and Armijo v. Prudential Insurance Co. of America, 72 F.3d 793, 797 (10th Cir. 1995).

114. *Green Tree,* 531 U.S. at 85-89.

115. *Id.* at 89-92.

portionment of fees and costs.[116] Randolph argued that this silence interfered with the effective vindication of her statutory rights because she faced potentially substantial arbitration costs.[117] In analyzing the issue, the Court began by noting that the FAA was passed to end judicial hostility toward arbitration agreements and also that numerous federal statutory claims have properly been sent to arbitration.[118] Citing *Gilmer*, the Court recanted the oft-heard line regarding the effective vindication of statutory rights in arbitration.[119]

In determining the validity of Ms. Randolph's arbitration agreement, the Court noted that she did not challenge it as inappropriate for arbitration, but rather argued that the "risk" that she might bear prohibitively high arbitration costs if she pursued her claim in the arbitral forum would force her to forgo the arbitral resolution of any of her claims.[120] Although the Court noted that "it may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum," the record did not indicate that Randolph would bear such costs or be unable to afford them should they be assessed to her.[121] Thus, the "risk" that a litigant would be "saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."[122] Accordingly, the Court reversed the court of appeals' determination, and ruled that the party attacking an arbitration agreement because of fees bears the burden of establishing that the fees are prohibitively expensive.[123] Randolph did not meet this burden.

Justice Ruth Bader Ginsburg, joined by Justice John Paul Stevens, Justice David Souter and Stephen Breyer, dissented.[124] Although the dissent agreed with the procedural rule adopted by the majority concerning final appealable orders, they disagreed with the majority's discussion of

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116. *Id.* at 89.
117. *Id.*
118. *Id.* at 89-90.
119. *Id.*
120. *Green Tree*, 531 U.S. at 90.
121. *See id.* at 90-91.
122. *Id.* at 90.
123. *Id.* at 91-92.
124. *Id.* at 92. Justice Breyer only dissented in part, and did not join in Part III of the dissent.

the fee issue.[125] Justice Ginsburg wrote "the Court today deals with the 'who pays' question" and essentially required "a party, situated as Randolph is, either to submit to the arbitration without knowing who will pay for the forum or demonstrate up front that the costs, if imposed on her, will be prohibitive. As I see it, the case in its current posture is not ripe for such a disposition."[126] After discussing arbitration precedence and the *Cole* decision, the dissent argued that the "Court has reached out prematurely to resolve the matter in the lender's [Green Tree] favor."[127] The proper approach, the dissent argued, would be to remand the case to clarify what type of arbitral fee system Green Tree employed and whether this system violated the law.[128] Further, the dissent pointed out that Randolph could return to the district court post-arbitration. Thus the majority's decision did not resolve the issue presented, was uncertain, and lacked judicial economy.[129] Therefore, the dissent disapproved of the majority's action in reaching out to inadequately resolve an underdeveloped issue.

III. THE POST-*GREEN TREE* ERA

In the post-*Green Tree* era, three United States Courts of Appeals have had occasion to visit the fee issue. Presumably, because the Supreme Court had ruled on the issue and set forth a test, the determinations should be unanimous. However, as the decisions indicate, the Supreme Court's *Green Tree* language is far from a rule that creates predictable results.

The United States Court of Appeals for the Fourth Circuit was the first appellate court to apply *Green Tree*, and did so in *Bradford v. Rockwell Semiconductor Systems, Inc.*[130] *Bradford* involved John B. Bradford's age discrimination suit against his former employer, Rockwell Semiconductor Systems Incorporated.[131] Bradford's employer was acquired by Rockwell, and as a condition of employment, Bradford was required to sign an arbitration agreement which required all claims to be arbitrated.[132]

125. *Id.* at 92-93.

126. *Green Tree*, 531 U.S. at 93. As a former civil procedure professor, one must grant Justice Ginsburg deference in the area of procedure.

127. *Id.* at 96.

128. *Id.* at 96.

129. *See id.* at 97.

130. Bradford vs. Rockwell Semiconductors Sys., Inc., 238 F.3d 549 (4th Cir. 2001).

131. *Id.* at 551 (emphasis in original).

132. *Id.*

The terms of the agreement mandated that the "parties shall share equally the fees and costs of the *arbitrator*."[133] Bradford presented his claims in arbitration, and the arbitrator ruled in favor of Rockwell.[134] Subsequently, Bradford filed suit in district court alleging the same claims. The district court granted Rockwell's motion for summary judgment. Bradford appealed arguing that "fee splitting provisions necessarily render arbitration agreements unenforceable as a matter of law because" they deter employees from pursuing their rights under the federal statutes.[135] On appeal, Mr. Bradford sought a bright line rule invalidating arbitration agreements that assign all or part of the fees to employees.[136]

The court began its opinion by recanting the Supreme Court's arbitration precedence language, and then noting the approach taken by the *Cole* and *Paladino* courts, and the contrary approach taken by the *Williams, Rosenberg, and Kovleskie* courts.[137] Next, the court noted that the Supreme Court said in *Green Tree* that fees could render an arbitration agreement unenforceable where the costs are so prohibitively high that they deny the litigant the ability to effectively vindicate his statutory rights.[138] The court then delved extensively into the *Cole* and *Shankle* opinions, rejecting these approaches and adopting the *Williams* case-by-case approach.[139] The court opined, "we believe that the appropriate inquiry [when addressing arbitral fees] is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation . . . ."[140] This approach, which the court argues complies with the Supreme Court's *Green Tree* approach, calls upon a reviewing court to examine "the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims."[141] Thus, even though an employee litigant may have to pay

133. *Id.*
134. *Id.*
135. *Id.* at 552.
136. *Bradford,* 238 F.3d at 552.
137. *Id.* at 553-54. All of the aforementioned cases are discussed in depth in section II of this study.
138. *Id.* at 554 (citing *Green Tree,* 531 U.S. at 90).
139. *Bradford,* 238 F.3d at 554-56.
140. *Id.* at 556.
141. *Id.*

thousands of dollars in arbitration fees and costs, the overall cost of the legal action would still be cheaper than a long, drawn out court action with substantially higher legal fees.[142] Therefore, the question is not who pays, but how much is paid and whether the employee litigant can afford to pay this amount. Such an approach almost certainly requires courts to conduct a post-arbitration inquiry because the necessary facts will not be known until the parties have completed their arbitration in the matter.

In 2001, the United States Court of Appeals for the Eleventh Circuit had occasion again to consider a fee issue, but this time in the post-*Green Tree* era.[143] The case involved Damiana Perez, a security agent employed by Globe Airport Security Services, Inc. at the Miami International Airport.[144] After Perez was terminated, she brought a discrimination suit and the employer countered with a motion to compel arbitration in accordance with the extensive pre-employment dispute resolution agreement.[145] The agreement contained a fee-sharing provision that explicitly split the fees equally between the employer and the employee.[146] Based on the fee-sharing clause, the district court denied the motion to compel arbitration and Globe's appeal followed.[147]

On appeal, the court considered two issues. First, it determined that the FAA was applicable to Ms. Perez notwithstanding her employment at a hub of interstate commerce.[148] Secondly, and most important to this study, the court addressed the fee-sharing clause in light of the *Green Tree* decision.[149] The court began by noting that the district court decided the case *before Green Tree*, and regardless, this case was different than *Green Tree* because the agreement at issue here was not silent as to costs.[150] The court argued that it was not necessary to go into an inquiry to determine whether arbitral fees and cost were so prohibitively expensive, because the agreement was "illegal and unenforceable for other compelling reasons."[151] Primarily, the court determined that the agreement was illegal and unenforceable because it mandated arbitral fee sharing,

142. *Id.*
143. Perez v. Globe Airport Sec. Serv., Inc., 253 F.3d 1280 (11th Cir. 2001).
144. *Id.* at 1281.
145. *Id.* at 1281-83.
146. *Id.* at 1283.
147. *Id.*
148. *Id.* at 1284. Ms. Perez had argued that she was engaged in the movement of goods in interstate commerce, and thus was exempt from the FAA under the *Circuit City* decision. *See* Circuit City Stores v. Adams, 532 U.S. 105 (2001).
149. *Perez*, 253 F.3d at 1284.
150. *Id.* at 1284-85.
151. *Id.* at 1285.

and this conflicted with Title VII's grant of discretion to award costs and fees to the prevailing party.[152] Thus, because the agreement took away the discretion of the arbitrator to award fees and costs in a Title VII action to the prevailing party, the entire arbitration agreement was illegal.[153]

The employer countered the court's disapproval of the fees and costs provision, arguing that the court should sever any offending provision so as to give effect to the agreement to arbitrate.[154] However, the court refused to sever the illegal clause because it believed if it did sever clauses of this type, employers would create arbitration agreements with illegal clauses, thus deterring employees from bringing suit or forcing them to bring suits to reform the agreement.[155] Instead, the court decided to invalidate the agreement, forcing employers to create more employee-friendly clauses at the outset of the relationship, rather than making courts do so in the mist of a dispute.[156] Thus, public policy warranted invalidating the entire agreement in order to encourage the creation of better arbitration agreements.

After the *Perez* decision, the United States Court of Appeals for the Eighth Circuit considered a similar issue in a challenge to an arbitration agreement.[157] The case involved Marken Gannon's discrimination suit against her former employer, Circuit City Stores, Inc.[158] Gannon's employment was governed by an arbitration agreement that mandated fee-sharing and limited punitive damages available in arbitration.[159] The district court refused to compel arbitration, without reaching the fee issue, on grounds that the punitive damage limitation rendered the entire agreement unenforceable because such language was illegal and contrary to federal discrimination statutes.[160] Circuit City appealed.

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152. *Id.* at 1285-86 [citing 42. U.S.C. sec. 2000e-5(k)].

153. *Perez,* 253 F.3d at 1287.

154. *Id. But see* RESTATEMENT (SECOND) OF CONTRACTS, §§ 178-184 (1981) (allowing severance in cases analogous to *Perez*).

155. *Perez,* 253 F.3d at 1287.

156. *Id.*

157. Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (2001), *reh'g and reh'g en banc denied.*

158. *Id.* at 679.

159. *Id.* at 679-84.

160. *Id.*

The court of appeals, while recognizing the illegality of punitive damage clause, nonetheless severed the offending clause and gave effect to the entire agreement, essentially disagreeing with *Perez's* public policy approach to severance.[161] Thus, the claim was sent to arbitration but without a limitation on the amount of punitive damages available.[162] While addressing the fee-sharing clause, the court noted that under *Green Tree,* fee-sharing is allowed unless the party challenging it can demonstrate the costs are prohibitively expensive, and that even if they succeed at showing this, the fee-sharing clause should be severed and the agreement to arbitrate should go forward.[163] Therefore, despite the existence of illegal clauses in an arbitration agreement, courts should enforce agreements to arbitrate and sever any illegal clauses thereby giving effect to the parties' intent to arbitrate their dispute.

IV. WHERE DO WE GO FROM HERE?

The aforementioned cases demonstrate that there are divergent views on whether fee-sharing is permissible in agreements to arbitrate employment disputes. Due in part to the Supreme Court's inability to issue a bright line rule and the various Circuits' disparate views on the topic, prospective employee litigants and their counsel are left with uncertainty when considering whether to challenge an arbitration agreement on the issue of arbitral fees. This section will present the various issues faced by those who undertake the challenge, along with the arguments and counter-arguments that pertain to them.

The first decision that must be made is whether to challenge the agreement pre-arbitration or post-arbitration. If a party decides to challenge the agreement pre-arbitration, they may run into a court eager to reduce its caseload through use of the justiciability doctrine. Thus, a court may determine the issue is not ripe for review because further factual development is required.[164] Counsel for employers will most certainly want to argue ripeness at this stage in the dispute. Further, employer's counsel may also argue that if the court decides to entertain the fee issue early

161. *Id.*

162. *Id.* at 682-83.

163. *Gannon,* 262 F.3d at 683 n.9. The dissent in *Gannon* would have followed *Perez. Id.* at 683-84.

164. *See Green Tree,* 531 U.S. at 93. (Ginsburg, J. dissenting). *See also* Abbot Labs. v. Gardner, 387 U.S. 136, 151-53 (1967) (noting a case is not ripe for review if further factual development is required). *But see* Reno v. Catholic Soc. Serv., Inc., 509 U.S. 43, 59 (1993) (noting a case is ripe where the plaintiff is faced with an immediate dilemma).

and invalidates the agreement because of the imposition of fees, such intervention contradicts the strong federal presumption and policy in favor of arbitration agreements.[165] After all, under Section 4 of the FAA, courts have the power to set aside arbitrations in which the employee was not effectively able to vindicate their statutory rights. Thus the pre-arbitration phase is an inappropriate time to challenge the imposition of arbitral fees because so little is known at that time.[166] However, the counter argument is that under the *Perez* approach, courts should invalidate certain clauses pre-arbitration in order to deter employers from placing illegal or offensive clauses in arbitration agreements.

If there is a challenge to a clause pre-arbitration, it is essential that elements of the clause be fully presented and explained to the court. If the clause names a provider organization, or amends the rules of the provider organization, such evidence must be presented in a manner to show how this does or does not effectively deter the vindication of the employee's statutory rights. Even if the clause seems offensive to employees' rights, counsel for the employer may want to present the *Williams* and *Bradford* approach, and argue that the employee will save money in the long run since the prosecution of an arbitration case is generally less expensive in the aggregate than the prosecution of the same case in court.

If there is a post-arbitration challenge to the arbitration clause based upon fees, the case is slightly different. First, presumably, there is a better factual record to base financial arguments upon. The costs of the arbitral proceedings are known, and the employee's ability to pay this amount is easier to establish. The employer's counsel may want to counter the employee's challenge with *Gilmer's* effective vindication of statutory rights analysis, arguing that the fee clause had no effect on the employee's ability to present their claim in the arbitral forum. If such arguments are unpersuasive, the employer's counsel should rely on *Green Tree's* "prohibitively high" language, arguing that the employee must demonstrate that the costs of arbitration were so prohibitively high that they interfered with the vindication of the employee's rights. Again, to drive this point home, the employer's counsel would want to present evidence of money saved by sending the matter to arbitration as opposed to sending the matter to

165. *See Gilmer*, 500 U.S. at 24.
166. 9 U.S.C. § 4 (West 2002).

court.[167] However, the employer's counsel must keep in mind that post-arbitration, if thousands of dollars in arbitral fees are assessed to an employee litigant, courts may be leery about allowing such an award to stand.

The subject at hand is ripe with public policy issues on both sides, and as such there is no apparent right or wrong approach when considering the imposition of fees arising from the arbitral forum. Employees will continue to argue that fees effectively deter them from accessing the forum, while employers will counter this argument by noting that the possibility of fees weeds out weak claims and frivolous suits by over-eager plaintiff's attorneys. As the cost of arbitration rises, employees will challenge fees starting at $250 per hour, while employers will point out that the money expended to pay the arbitrator is saved from money expended to pay the attorney. Employees will seek a bright line rule, invalidating all arbitration agreements that apportion any arbitral fees to prospective employee litigates. Employers will argue that a bright line goes too far and leads to absurd results. For example, if Microsoft fires its Chief of Development, Bill Gates, and the dispute goes to arbitration, is it per se unfair to assess Bill Gates a couple thousand dollars in arbitral costs? Finally, there are arguments in favor of invalidating an entire arbitration agreement because of fees, as well as arguments in favor of severing offending clauses and giving effect to the parties' intent to arbitrate the dispute.

V. CONCLUSION

Ultimately, these issues and many more will continue to arise, and opinions will continue to diverge depending on which judicial district or circuit the parties are located. Such ambiguity and uncertainty is almost certain to continue until the Supreme Court revisits their decision in *Green Tree* and clarifies the approach that all courts construing fee issues in arbitration agreements must take. In fashioning such a rule, the Court must be mindful of the consequences of apportioning fees to minimum wage workers who signed agreements to arbitrate their employment related disputes as a condition of their employment, and employers who utilize arbitration to keep down the costs of litigating disputes that invariably come with employees. As such, it must strike a proper balance be-

167. A publication by the American Bar Association Section of Dispute Resolution notes that most attorneys will not begin a lawsuit worth less than $60,000.00, while arbitration costs can amount to five percent of this total. *See* Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, in ARBITRATION NOW 25 (Paul H. Haagan and ABA Section on Dispute Resolution eds, 1999).

tween these two interests, establish a workable rule, and provide adequate guidance and clarification. Until then, the current state of the rules regarding fees will continue to harm the arbitral process favored by the Court.